

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GRAVITY PAYMENTS, INC., a  
Washington corporation,

Plaintiff,

V.

DAVID HOPWOOD, an individual,

Defendant.

Case No. 15-139 RSM

## ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

## I. INTRODUCTION

This matter comes before the Court on Plaintiff's Motion for Default Judgment. Dkt. #40. Defendant David Hopwood has not responded to this Motion. The Court entered default against Mr. Hopwood on October 12, 2016, after he failed to respond to the Court's Order to Show Cause. Dkt. #38. Having reviewed the relevant briefing and the remainder of the record, the Court finds adequate bases for the entry default judgment.

## II. FACTUAL BACKGROUND

Gravity Payments is a national provider of credit and debit card processing services. It has provided services to merchants in the Norman, Oklahoma area since 2010 and continues to do so today. Dkt. #1 at ¶ 3.1-3.2; Dkt. #3 at ¶ 2. In July, 2013, Gravity Payments began

1 employing Defendant as an account consultant in the Norman, Oklahoma area market. Dkt. #3  
2 at ¶ 3. On or about July 22, 2013, Defendant and Gravity Payments executed an Employment  
3 Agreement. Dkt. #3 at ¶ 4.

4 The Employment Agreement between Gravity Payments and Defendant included an  
5 Agreement Not to Compete, which provided:  
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7 During the period of employment with the Company, and for two  
8 (2) years following termination of employment, Employee will not  
9 engage in, accept business from, or have a financial interest in any  
10 business, either separately, jointly, or in association with others,  
11 directly or indirectly, as an officer, director, consultant, agent,  
12 employee, owner, partner, representative, stockholder or otherwise,  
13 which competes with the company.

14 Dkt. #1, Exh. A, at § 5(a); Dkt. #3 at ¶ 4.

15 Defendant's employment with Gravity Payments was terminated on approximately  
16 October 18, 2013. Dkt. #1 at ¶ 3.9; Dkt. #3, at ¶ 9. After leaving Gravity Payments, Defendant  
17 continued working in Norman, Oklahoma, for MeritCard Solutions, LP ("MeritCard") and  
18 Regal Payment Systems, LLC ("Regal Payment Systems"), two of Gravity Payments'  
19 competitors. Dkt. #1 at ¶ 3.10; Dkt. #3, at ¶ 8.

20 In response to a subpoena, Regal confirmed that Defendant had worked on its behalf,  
21 including on several of Gravity Payments' merchant accounts. Dkt. #34, Ex. A and Ex. B.

22 Both companies provide credit and debit card processing services, they each market to  
23 merchants in multiple locations that include Norman, Oklahoma, and their services in the  
24 Norman, Oklahoma market directly compete with Gravity Payments' services that it markets  
25 and provides to customers and potential customers in the Norman, Oklahoma area. Dkt. #1 at ¶  
26 3.11-3.12; Dkt. #3 at ¶¶ 9-10.

1 Defendant's employment and association with MeritCard and Regal Payment Systems  
2 breached his non-competition agreement with Gravity Payments. *See* Dkt. #1, Ex. A, at ¶ 5(a).

3 Defendant's Employment Agreement also included an Agreement Not to Solicit, which  
4 provided:

5 Employee further agrees that during the term of his employment  
6 and for a period of three (3) years thereafter, he will not solicit or  
7 otherwise contact either separately, jointly, or in association with  
8 others, directly or indirectly, or accept business from any of the  
9 following:

- 10 (i) any of the Company's customers;
- 11 (ii) any entities that were customers of the Company (or its  
12 affiliates) at any time during the five years immediately  
preceding the termination of this Agreement;
- 13 (iii) any employees or other agents of the Company;
- 14 (iv) any of the Company's strategic partners or referral  
sources;
- 15 (v) any prospects developed by the Company.

16 Dkt. #1, Ex. A, at ¶ 5(d).

17 Defendant breached his non-solicitation agreement after termination of his employment.  
18 Following his termination, Defendant has solicited, otherwise contacted, and/or accepted  
19 business from Gravity Payments' customers in Norman, Oklahoma, trading on relationships he  
20 built with those customers during his employment with Gravity Payments. Dkt. #3 at ¶¶ 7,11.  
21 The Gravity Payments' customers that Hopwood has solicited, otherwise contacted, and/or  
22 accepted business from include Antique Garden; Big-A Burger; Broadway Parts; Buchanan  
23 Bike Shop; Cellular & Gadget Repair, LLC; David K. Duncan, MD; Derek R. Mask, DDS; The  
24 Dugout; The Gray Owl; The Mont; Oculofacial Plastics Association; Showplace Signs;  
25 Ultimate Thrift and; Xpress Cellular. Dkt. #1 at ¶ 3.13. Certain of these actions are confirmed  
26 in correspondence from counsel. Dkt. #34, Ex. C. The documents Defendant produced, along  
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1 with his attorney's admission, confirm that Defendant has solicited eleven Gravity Payments  
2 customers.

3 The Employment Agreement also prohibited improper use of Gravity Payments'  
4 Confidential Information as follows:

5 During the term of his/her employment with the Company and  
6 thereafter, (i) Employee will not divulge or disclose any  
7 Confidential Information to anyone, directly or indirectly, other  
8 than in the regular and proper course of business of the Company  
9 (or its affiliates) or as required by law and (ii) Employee will not  
use, directly or indirectly, any Confidential Information for the  
benefit of anyone other than the Company (or its affiliates).

10 Complaint, Dkt. #1, Exh. A, at § 6(c). Since leaving Gravity Payments' employment,  
11 Defendant has used Gravity Payments' Confidential Information to enable his competition for  
12 Gravity Payments' customers. Dkt. #1 at ¶ 3.15.

14 Plaintiff has been provided more than seven days' notice of this motion for default  
15 judgment.

16 **III. DISCUSSION**

17 Based on this Court's Order of Default and pursuant to Rule 55(a), the Court has the  
18 authority to enter a default judgment. Fed. R. Civ. P. 55(b). The Court has been provided  
20 sufficient evidence to determine liability and the amount of damages claimed herein, as is  
21 required by Rule 55(b)(2). *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The  
22 Court must next determine whether to exercise discretion to enter a default judgment. *Id.*  
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24 "Factors which may be considered by courts in exercising discretion as to the entry of a  
25 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of  
26 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake  
27 in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default  
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1 was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil  
2 Procedure favoring decisions on the merits.” *Id.*

3 The majority of the *Etel* factors weigh in favor of entry of default judgment. Plaintiff  
4 could easily be prejudiced without the entry of a permanent injunction related to the further use  
5 of Plaintiff’s confidential information. Plaintiff’s Complaint is sufficient and with merit, and  
6 Defendant has failed to present any evidence or argument to the contrary despite prior  
7 representation in this case. The fact that the sum of money at stake is not overly large weighs  
8 in favor of default judgment, especially because the monetary damages comprise wholly of  
9 liquidated damages agreed to by Defendant. Finally, the Court finds there to be a low  
10 probability that default in this case was due to excusable neglect, given Defendant’s many  
11 opportunities to respond to filings in this matter, the length of time between the Motion for  
12 Default and this Order, and the representations of his prior counsel, *see* Dkt. #31.

13 Injunctive relief is authorized by the parties’ contract, which provides, “Employee  
14 [Defendant] expressly agrees that the breach of any restriction contained in Sections 5 and/or 6  
15 hereof would result in irreparable injury to the Company [Plaintiff]...[and that] in addition to  
16 all other available remedies, [Plaintiff] shall be entitled to injunctive relief....” Dkt. #1, Ex. A  
17 at § 6(f).

18 The Employment Agreement provides that Gravity Payments is entitled to an award of  
19 liquidated damages based on Defendant’s breaches of contract. The contract provides for  
20 liquidated damages of \$20,000 in the event Defendant competes against Gravity Payments  
21 within two years after termination. Complaint, Exh. A, Dkt. #1, at § 5(f). The contract further  
22 provides that Defendant “shall pay the Company \$5,000 for each customer who is lost” as a  
23 result of Defendant soliciting or accepting business from the Company’s customers. Dkt. #1,  
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1 Ex. A at § 5(g). Defendant solicited and/or accepted business from at least eleven customers of  
2 Gravity Payments, whose business was lost as a result of Defendant's actions. Liquidated  
3 damages for violation of the non-solicitation provision therefore total \$55,000. In total,  
4 Defendant is liable to Gravity Payments for \$75,000 in liquidated damages.

5 The parties are both signatories to Defendant's Employment Agreement, which provides  
6 that the prevailing party "shall be awarded its reasonable attorneys' fees, costs and expenses" in  
7 any proceeding concerning enforcement of any provision in the contract. Dkt. #1, Ex. A at §  
8 10(e). As entry of default judgment is proper, Gravity Payments is the prevailing party and  
9 entitled to recover its attorneys' fees, costs and expenses.

10 Given all of the above, the Court finds the proposed default judgment reasonable.  
11 Further, when a party fails to respond to a motion, as Mr. Hopwood has here, the Court may  
12 consider that failure as an admission that the motion has merit. LCR 7(b)(2).

#### 15 IV. CONCLUSION

16 The Court, having reviewed the relevant briefing and the remainder of the record, finds  
17 adequate bases for default judgment. Accordingly, the Court hereby finds and ORDERS:

- 19 1. Plaintiff's Motion for Default Judgment (Dkt. #40) is GRANTED.
- 20 2. Consistent with the parties' contract and relief sought in Plaintiff's complaint,  
21 Defendant is ENJOINED from divulging, disclosing, or using Gravity Payments'  
22 Confidential Information including its customer and prospect lists, its pricing  
23 structures, and its prospects' confidential business and identifying information.
- 25 3. Plaintiff is awarded \$75,000 in liquidated damages to be paid by Defendant.
- 26 4. Plaintiff shall move for attorneys' fees and non-taxable costs **within 14 days** of the  
27 date of this Order.

1 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment consistent  
2 with this Order.

3 DATED this 10<sup>th</sup> day of November 2016.

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7 RICARDO S. MARTINEZ  
8 CHIEF UNITED STATES DISTRICT JUDGE  
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